HASHIM BIN SAUD v. YAHAYA BIN HASHIM & ANOR.

[O.C.J. (Sharma J.) June 30, 1973]

[Alor Star — Civil Suit No. 203 of 1972]

Constitutional Law — Constitutional question raised — Claim for damages for wrongful arrest against Government — Whether High Court has jurisdiction to hear the case — Courts of Judicature Act, 1964, ss. 25(1) and 48(1) — Federal Constitution, arts. 5(1) and 128(2).

Practice and Procedure — High Court — Jurisdiction.

The plaintiff claimed damages for wrongful arrest against an Inspector of Police and the Government. It was contended by the Senior Federal Counsel for the defendants that the High Court had no jurisdiction to go into the merits of the case as the pleadings disclosed that an issue under Article 5(1) of the Federal Constitution would arise in the suit.

Held: (1) the combined effect of Article 128(2) of the Federal Constitution and section 48(1) of the Courts of Judicature Act, is that if in any proceedings in the High Court any constitutional question arises the judge of the High Court trying the case, may either try it himself and determine that question or without deciding and determining the question stay the proceedings and refer the question for the decision of the Federal Court;

(2) in this case the preliminary objection as to lack of jurisdiction of the court must be dismissed with costs.

CIVIL SUIT.

Karpal Singh for the plaintiffs.

Mokhtar bin Haji Sidin (Senior Federal Counsel) for the defendants.

Sharma J. (delivering oral judgment): This suit is fixed for hearing today. At the very commencement of the hearing the learned Senior Federal Counsel appearing for the defendants rose to make a preliminary objection to the jurisdiction of the court to entertain this suit and he referred to the provisions of Article 128(2) of the Federal Constitution which reads: —

"Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court *shall* have jurisdiction *(subject to any rules of court regulating the exercise of that jurisdiction)* to determine the question and remit the case to the other court to be disposed of in accordance with the determination." (emphasis supplied).

The opening words of section 23(1) of the Courts of Judicature Act, 1964 are: —

"Subject to the limitation contained in Article 128 of the Constitution the High Court shall have jurisdiction to try *all* civil proceedings....." (emphasis supplied).

There is no doubt that the rights claimed by the plaintiff in the present suit are civil rights and these are civil proceedings. He is only claiming damages in respect of what he alleges was a false and wrongful arrest made by the first defendant who according to the admission on pleadings was an Inspector of Police in the employ of the second defendant.

Section 48(1) of the Courts of Judicature Act, *before its amendment* in 1964, read as follows: —

"Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the judge hearing such proceedings *shall* stay the same on such terms as may be just to await the decision of such question by the Federal Court."

It is obvious from the pleadings that one of the "fundamental liberties" guaranteed under Part II of the Constitution is going to be relied upon by the plaintiff in this suit and the relevant Article which is going to come up for discussion and argument is Article 5(3) of the Constitution. This Article reads: —

"Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

Section 25(1) of the Courts of Judicature Act enumerates the powers exercisable by the High Court and those powers include all those powers which are vested in it by any written law in force in the country.

Section 48(1) of the Courts of Judicature Act, 1964 was amended in 1964 itself by Act No. 35 of 1964 and the word "shall" appearing in section 48(1) was substituted by the word *"may"*. The explanatory statement to the Bill to the amending Act reads: —

"This Bill is intended to bring the provisions of section 30 and 48 of the Courts of Judicature Act into conformity with Article 128 of the Constitution.

As these sections at present stand, it is thought that they have the effect of extending the exclusive jurisdiction of the Federal Court to decide constitutional questions beyond the limits of that exclusive jurisdiction prescribed by the Constitution."

I might have been in entire agreement with the arguments put forward by the learned Senior Federal Counsel if the provisions of section 48(1) of the Courts of Judicature Act had remained unamended. Section 48(1) of the Courts of Judicature Act, as it now stands, confers a discretion on the High Court whether to refer the constitutional question to the Federal Court or not. The relevant words in Article 128(2) of the Constitution conferring this discretion are the words appearing within brackets in that sub-Article, and those words qualify the jurisdiction of the Federal Court. The effect of those words in brackets is that if in any proceedings before the High Court a question arises as to the effect of any provision of the Constitution the Federal Court has the jurisdiction to determine that question, but that jurisdiction is also subject to the rules of court which regulate the jurisdiction of that court, *i.e.* the court in which the proceedings are filed. In the present case that court is the High Court. The combined reading of Article 128(2) and of section 48(1) of the Courts of Judicature Act is, in my view, capable of only one meaning and that is that if in any proceedings in the High Court any constitutional question arises, the Judge of the High Court trying the case may either try it himself and determine that question, or without deciding and determining it stay the proceedings and refer the question for the decision of the Federal Court.

I am unable to accept the contention of the Senior Federal Counsel that I have no jurisdiction to go into the merits of this case merely because the pleadings disclose that an issue under Article 5(3) of the Federal Constitution arises in this suit. The point of jurisdiction of this court had not been taken at all by the defendants. It is an elementary principle of pleadings that a plea as to jurisdiction should be taken at the earliest opportunity.

It is perhaps not too late to ask for an amendment of the statement of defence in order to raise the plea

of jurisdiction and when I asked the Senior Federal Counsel if he wished to apply to amend the statement of defence he at once made an oral application for leave to amend the defence by insertion of the following two paragraphs after paragraphs 4 and 9 respectively of the statement of defence: —

"4A. The statement of claim does not disclose any cause of action and as such it should be struck out."

"9A. The High Court has no jurisdiction to go into the question of Article 5(3) of the Constitution by virtue of Article 128(2) of the Constitution."

The authorities lay down that the court does not readily allow at the trial an amendment the necessity for which should have been abundantly apparent months ago and was not then asked for, but sometimes amendments are allowed even at the hearing so that the entire range of litigation and dispute can be gone into. The other side can, of course, always be compensated by costs. I have already stated my views on the question of jurisdiction as far as the proposed paragraph 4A of the statement of defence is concerned. I am told by the learned Senior Federal Counsel that to substantiate that averment in the defence, if it is allowed, he is relying on Order 19 rule 27 of the Rules of the Supreme Court and no other provision of the Rules of the Supreme Court. Order 19 rule 27 of the Rules of the Supreme Court is in the following terms: —

"The court or a judge may at any stage of the proceedings order to be struck out or amended any matter ... or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; ...."

Applications under Order 19 Rule 27 should be made promptly and as a rule before the close of the pleadings otherwise the court may decline to exercise the discretion conferred by that rule. It is again the rule that the courts do not dictate to the parties how they should frame their case and this is a rule which, as has often been said, ought to be preserved sacred. Seeing the statement of claim, I am at a loss to understand how it can be said that any part of the statement of claim is either unnecessary or is scandalous or is such which would tend to prejudice, embarrass or delay the fair trial of the action.

I, however, do not wish to deprive the defendants of the opportunity to place before the court points which they wish to urge so that they may have the fullest opportunity to present their case and to attack the plaintiff's claim in any manner available to them. It is for these reasons and these reasons alone that I am going to grant the application for amendment but subject to the payment of costs.

We have already spent nearly two hours on arguments on the two applications. The costs of the applications and all costs incidental to the amendment will be taxed by the Assistant Registrar and paid by the defendants. The amended statement of defence should be filed by tomorrow. I see no reason why the suit cannot go on today.

The preliminary objection as to lack of jurisdiction of the court stands dismissed with costs.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*

YEOH TAT THONG v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Azmi L.P.) July 9, 1973]

[Kuala Lumpur — Federal Court Civil application No. 1 of 1973]

Constitutional Law — Jurisdiction of High Court — Application for declaration that subsidiary legislation is ultra vires and void — Not a challenge to validity of primary legislation — No leave of Federal Court required — Courts of Judicature Act, 1964, s. 48(1) — Federal Constitution, arts. 4, 128 and 160.

Practice and Procedure — Validity of subsidiary legislation — High Court — Jurisdiction.

The applicant intended to issue a writ of summons for declarations, *inter alia*, that subsidiary legislation made by the State Authority in Penang under the National Land Code was *ultra vires* and null and void. He applied to the Federal Court for leave to issue the writ.

Held: (1) the declarations to be sought in this case could not be said to come within the provisions of clauses 3 and 4 of Article 4 read together with Article 128 of the Federal Constitution, as the law which is to be challenged is not a primary law made by the State Legislature and the challenge will not be made on the ground that the matter has trespassed on the Federal sphere;

(2) the High Court has jurisdiction to deal with the matter even though the questions raised might have effect on any provisions of the Federal Constitution and therefore, no leave of the Federal Court was required.

Cases referred to:-

(1) *Oriental Holdings Sendirian Berhad* v. *Government of Penang and another* [1972] 2 M.L.J. 248.

(2) *Fernandez* v. *Attorney-General* [1970] 1 M.L.J. 262 at p. 264.

FEDERAL COURT.

Lim Kean Chye for the applicant.

Mohktar bin Haji Sidin (Senior Federal Counsel) for the Government of the Federation.

Abu Talib bin Othman (Legal Adviser, Penang) for the Director of Lands and Mines, Penang.

Azmi L.P.: The applicant, the registered owner of lands registered under Holdings 11, 12, 22 and 23, Town of Bukit Bendera, Penang, applies to me, a judge of the Federal Court, for leave to issue a writ of summons in the High Court, Penang, for the following declarations: —

1. A declaration that the plaintiff's lands registered as Holdings 11, 12, 22 and 23 Town of Bukit Bendara are not alienated lands within the meaning either of section 101 or section 102 of the National Land Code.
2. A declaration that paragraph 2(a) of the Schedule to the National Land Code (Penang and Malacca) Order 1965 and published as L.N. 478 in the *Federal Government Gazette* of 25.12.65 is *ultra vires* section 439 of the National Land Code and is null and void.
3. A declaration that the notification P.U. (A) 526 published in the *Government Gazette* on 25.12.69 by the Minister of Lands and Mines purporting to be made under section 439 of the National Land Code is *ultra vires* the said section and is null and void.
4. A declaration that the purported laws enacted by the State Authority of Penang by virtue of and under section 101 of the National Land Code and published in the *Penang Government Gazette* on 29.1.70 as Penang P.U. 4 of 1970 are null and void and of no operative effect.
5. A declaration that the purported laws enacted by the State Authority of Penang by virtue of and under